

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT JAMES VAN ELLS,

Plaintiff/Counter-Defendant-
Appellee,

V

TAMI LYNN VAN ELLS,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

July 3, 2008

No. 270810

Eaton Circuit Court

LC No. 05-001214-DO

Before: Kelly, P.J., and Cavanagh and O’Connell, JJ.

KELLY, J. (*Concurring in part and dissenting in part.*)

I concur in the majority’s decision to vacate the trial court’s order denying defendant’s request for attorney’s fees and remanding for further proceedings. I respectfully dissent, however, from the majority affirming the award of spousal support both as to its amount and duration. I would also vacate the spousal support award and remand for further proceedings.

A trial court’s award of spousal support is reviewed for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). An abuse of discretion occurs when the trial court’s decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court’s findings of fact related to spousal support are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). “A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made.” *Id.* at 654-655. If there is no clear error, we determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 655. The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Id.* at 654.

Here, the spousal support awarded by the trial court was inequitable. The trial court did not balance the needs and incomes of the parties and under the circumstances presented here, defendant would be substantially disadvantaged if expected to live on her employment income of

\$26,500.¹ Not only does the court's award of spousal support result in a disparity between the incomes and lifestyles of the parties, but it is unlikely that defendant will be able to maintain her standard of living in the short term without immediately invading her marital assets, contrary to our mandate in *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995). Further, it is unlikely that defendant will be able to maintain her lifestyle after five years, when plaintiff no longer provides spousal support. "[A] judge's role is to achieve equity, not to 'punish' one of the parties." *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993).

Although the trial court's award would provide defendant an additional \$12,000 annually, the trial court was clear that it intended the award to be for rehabilitative purposes only. Even if defendant received additional job training or education, it is unreasonable to expect that she would initially earn more than \$50,000. A large disparity in the parties' incomes would still remain that should be balanced more fairly, given that the parties' needs are similar. The parties had a lengthy marriage, defendant helped raise four children, and she did work during the majority of the years after the children were in school. Thus, I conclude that the trial court's award of spousal support did not balance the needs and equities of the parties and would vacate the award.²

Moreover, the trial court clearly erred in limiting the duration of the spousal support award. The judgment of divorce provides that the award was "temporary spousal support for rehabilitative purposes" and the Uniform Spousal Support Order provides that the support terminates on February 21, 2001 or until defendant receives \$57,000. However, MCL 552.28 provides:

On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to section 17, the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

¹ Although defendant's highest annual employment wages were a little more than \$23,000, which she earned in 2004, she had the potential to earn \$26,500 a year at her current job if she worked all of her available hours.

² Although plaintiff asserts that defendant could supplement her employment wages by investing her share of plaintiff's retirement funds, because these monies were placed in retirement accounts under defendant's name pursuant to an eligible domestic relations order, defendant does not have the option of removing the funds before retirement age without penalty. She did not receive an outright cash asset that could be placed in a non-retirement investment account and supplement her income with interest distributions.

In *Staple v Staple*, 241 Mich. App. 562, 573; 616 N.W.2d 219 (2000), this Court interpreted this provision and stated that "this statute unambiguously gives either party to an alimony judgment the right to petition the court to modify an alimony provision" In *Gates v Gates*, 256 Mich. App. 420, 433; 664 N.W.2d 231 (2003), we reiterated this principle stating:

In *Staple, supra* at 569, this Court made it clear that "MCL 552.28 . . . will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement."

Thus, under both *Staple, supra*, and MCL 552.28, because the spousal-support provision of the divorce judgment resulted from the trial court's disposition rather than agreement of the parties, the judgment may not be interpreted to preclude defendant from seeking to continue spousal support, or, in other words, modify the spousal support award. Accordingly, under the unambiguous language of MCL 552.28, defendant has a statutory right to seek modification of the spousal support award. *Gates, supra* at 433; *Staple, supra* at 562, 569. The trial court erred by limiting the award.

For these reasons, I would vacate the trial court's spousal support award and remand for reconsideration of spousal support.

/s/ Kirsten Frank Kelly